

# Doing Business in Thailand

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## LEGAL SYSTEM

### 1. What is the legal system (civil law, common law or a mixture of both)?

Thailand has a civil law legal system.

## FOREIGN INVESTMENT

### 2. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

Certain types of business activities are reserved under the Foreign Business Act 1999 (FBA) for Thai nationals only. Foreign investment in those businesses must comprise less than 50% of share capital unless specially permitted or otherwise exempted.

Potential investors should check with the three lists attached to the FBA, as summarised below, to determine whether their proposed business falls under any of the reserved business activities:

- **List 1.** This contains activities in which foreign shareholdings must be below 50% without any exception. Among others, they include:
  - newspaper businesses;
  - radio broadcasting;
  - television stations;
  - farming;
  - land trading.
- **List 2.** This contains activities in which foreign shareholdings must be below 50% except for those which receive either:
  - permission from the Minister of Commerce with approval by the Cabinet;

- investment promotion from the Board of Investment;
- authorisation by the Industrial Estate Authority of Thailand.

Among other things, they include:

- the production, sale and maintenance of firearms and armaments;
- domestic transportation by land, water and air;
- trading of Thai antiques or art objects;
- mining.
- **List 3.** This contains activities in which foreign shareholding must be below 50% except for those which receive either:
  - permission from the Director-General of the Department of Business Development at the Ministry of Commerce, with approval by the Foreign Business Committee;
  - investment promotion from the Board of Investment or from the Industrial Estate Authority of Thailand.

Among other things, they include:

- accounting, legal, architectural or engineering services;
- retail and wholesale;
- hotel;
- selling food or beverages;
- any kind of services business.

### 3. Are there any exchange control or currency regulations?

Foreign exchange transactions are regulated by the Exchange Control Act 1942 (as amended).

Commercial banks are authorised by the Bank of Thailand to approve the following foreign exchange transactions in its name:

- Remittance of an unlimited amount in payment of imported goods.
- Remittance of up to US\$100 million (about EUR68 million) or its equivalent per year for investing in or lending to affiliated entities abroad.
- Remittance of up to US\$100 million or its equivalent per year for investing in or lending to parent companies abroad that hold shares or have an ownership of not less than 10% of the resident entity, or affiliated business entities of the parent companies.
- Companies listed on the Stock Exchange of Thailand can invest abroad according to the second and third guidelines above without limit, and can lend overseas up to US\$100 million per year, provided they follow the second and third guidelines above.
- Remittance of up to US\$5 million (about EUR3.4 million) or its equivalent per person per year for the purchase of real property in a foreign country. Remittance to Thai emigrants who are permanent residents abroad of up to US\$1 million (about EUR683,000) per person per year.

Sums that exceed the limitations, or are for purposes other than those specified, require the Bank of Thailand's approval.

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#### 4. What grants or incentives are available to investors? Are any of these aimed specifically at foreign investors?

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The Board of Investment of Thailand grants both fiscal and non-fiscal incentives to qualifying investment projects in Thailand, and these incentives are available equally to both Thai and foreign investors. The incentives include, among others:

- Income tax holiday of up to eight years (depending on the geographical location of the project).
- Withholding tax exemption for dividend distribution during the tax holiday.
- 100% foreign ownership in certain businesses reserved under the FBA.
- Customs duty exemption or reduction for imported raw materials and machinery.
- Land ownership for foreign companies.
- Visa and work permit privileges for expatriates.

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## BUSINESS VEHICLES

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### 5. What is the most common form of business vehicle used by foreign companies to conduct business in your jurisdiction? In relation to this vehicle, please provide details on:

- Registration formalities (including timing).
- Minimum (and maximum) share capital.
- Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities).
- Any restrictions on the rights that can attach to shares.
- Any restrictions on foreign shareholders.
- Management structure and any restrictions on foreign managers.
- Directors' liability.
- Parent company liability.
- Reporting requirements (including filing of accounts) and cost of compliance.

The most common form of business vehicle used by foreign companies is the private limited company, as it limits shareholders' liability (to the remaining amount unpaid, if any, of the registered capital due on the shares respectively held by them). In addition, a private limited company is not regarded as foreign under the FBA (see *Question 2*), and hence is not restricted from engaging in reserved business, if Thai nationals own more than 50% of its share capital.

- **Registration formalities.** At least three natural persons (promoters) are required to establish a private limited company. The incorporation of a limited company must be registered with the Department of Business Development (DBD) of the Ministry of Commerce. The process includes reservation of a company name and filing and registration of a memorandum of association and incorporation documents, which must be signed by all promoters and directors. If all incorporation documents are signed and ready, the filing and registration with the DBD could be completed within one day. Total government fees are about 0.55% of the registered capital, with a minimum of THB5,500 (about US\$164) and a maximum of THB275,000 (about US\$8,179).
- **Share capital.** The minimum share capital for a foreign majority-owned company is THB2 million

(about US\$59,484). If the intended activity is reserved in the FBA (*see Question 2*), the minimum share capital is THB3 million (about US\$89,226). The par value of each share must be at least THB5 (about US\$0.15). The registered capital must be initially paid up at the minimum of 25% of the total amount.

- **Non-cash consideration.** In principle, non-cash capital contribution (payment in kind), such as assets or services, is acceptable if approved by the statutory meeting of the shareholders.
- **Rights attaching to shares.** The fundamental rights attached to shares are:
  - the right to attend shareholders' meetings;
  - voting rights;
  - the right to receive dividends.
- **Foreign shareholders.** If the company engages in any business activities reserved in the FBA (*see Question 2*), foreign shareholders must aggregately hold less than 50% of the total number of shares. Foreign shareholders are entitled to the same rights attached to shares as Thai shareholders.
- **Management structure.** A private limited company is managed by a board of directors consisting of at least one director who is elected by the shareholders in a general meeting. Generally, there is no nationality requirement for the directors, except for foreign companies permitted to engage in a business in List 2 of the FBA (*see Question 2*).
- **Directors' liability.** Directors are generally not personally liable to a third party for their actions done on behalf of the company unless they are in breach of their authority stipulated in the memorandum and articles of association of the company or in the shareholders' resolution. Directors can also be criminally liable if the company commits a criminal offence under certain statutes.
- **Parent company liability.** A parent company, as a shareholder, is only liable for the debts and losses of its subsidiary (which is a limited company in Thailand) up to the amount unpaid on its shares.
- **Reporting requirements.** Every year, all limited companies must file audited financial statements of the fiscal year (12-month accounting period) with the Ministry of Commerce and Revenue Department within five months from the end of the fiscal year. The Ministry of Commerce also requires that the filing must be done within one month after a general meeting of the shareholders to approve the audited financial statement.

## EMPLOYEES

### 6. What are the main laws regulating employment relationships?

The main laws regulating employment relationships in Thailand are:

- The Labour Protection Act.
- Sections 575 to 586 of the Thai Civil and Commercial Code on Hire of Services.
- The Labour Relations Act.
- The Social Security Act.
- The Compensation Fund Act.
- The Alien Employment Act (AEA).
- The Royal Decree Naming Professions Prohibited to Aliens (RD).

In addition, most laws provide for the promulgation of ministerial regulations.

Except for the AEA and the RD, Thai labour law applies to all employees working in Thailand, regardless of nationality. The AEA and the RD apply only to foreign employees working in Thailand.

With rare exceptions, none of the laws apply to Thai employees working abroad.

Thai courts usually uphold provisions on choice of law, but only to the extent that the application of the foreign law is not contrary to public order or good morals of Thailand.

### 7. Is a written contract of employment required? Are any agreements and/or implied terms likely to govern the employment relationship?

Employment contracts do not need to be in writing. The employer and employee relationship can be proven by the employer's payrolls or documents submitted to the Social Security Office or Revenue Department. This evidence can be brought to the courts to prove the employee's status as an employee.

### 8. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

Unless the company assigns employees to management representation and/or corporate transactions, or it is within

the scope of their responsibilities, employees are not automatically entitled to management representation or to be consulted in relation to corporate transactions.

However, employees are protected against redundancies or termination of employment without cause. Employees are entitled to compulsory severance pay, the amount depending on the length of their service, ranging from one month to ten months. If employees are found to have had their employment terminated without cause, the court may order reinstatement of employment even if compulsory severance pay has been paid to the employees.

Employers can potentially avoid litigation by consulting with employees and reaching a settlement and release agreement.

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### 9. How is the termination of individual employment contracts regulated?

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A distinction is made between fair/justified and unfair/unjustified dismissal. Grounds for fair/justified dismissal (termination with cause) include necessary and reasonable grounds which may arise due to employee fault, whereas termination without cause may occur as a result of inefficiency, downsizing because of financial losses, and so on.

Examples of termination with cause include:

- Dishonestly performing duties or intentionally committing a criminal offence against the employer.
- Deliberately causing damage to the employer.
- Negligently causing severe damage to the employer.
- Violating company work rules and regulations or lawful working orders, despite having received a written warning, except for serious cases in which no written warning is required.
- Abandoning work for three consecutive working days, whether or not holiday is taken in between, without justifiable reason.
- Having been sentenced to imprisonment by final court judgment.

For termination with cause, the employer can terminate employment immediately without making a severance payment. However, if the employer terminates employment without cause, the employer must serve a notice of termination one pay period in advance unless the employment contract states a longer notice period.

If the terminated employee considers the termination unfair, they may pursue the case in the labour courts and seek compensation for unfair dismissal. This compensation includes payments required by statute, such as severance pay. The amount of compensation for unfair dismissal is subject to the court's discretion, which will take into consideration various factors such as age, tenure, position, cause of termination, and so on.

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### 10. Are redundancies/mass layoffs regulated? If so, please give details.

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There are no specific regulations on termination due to redundancies/mass layoffs. The courts determine the reasonableness of the grounds for termination of each employee. However, when employment is terminated due to certain kinds of restructuring relating to technology or machinery, employers must give 60 days' advance notice to the Labour Inspector. In addition, employers must give 60 days' advance notice to the affected employees, or make payment in lieu of notice. This type of termination is subject to normal severance pay (see *Question 9*), and the employer must also pay special severance to employees who have at least six years' tenure.

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### 11. Do foreign employees require work permits and/or residency permits? If so, how long does it take to obtain them and how much do they cost?

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Thai employment and immigration laws prescribe that a foreign person intending to work in Thailand must first receive a non-immigrant business ("B") visa from any Royal Thai Embassy/Consulate abroad before entering Thailand and then obtain a work permit from the Ministry of Labour in Thailand before starting work. The work permit application must be sponsored by an entity or sponsor who is registered in Thailand. Processing the application normally takes about ten to 14 days. Specially expedited processing is available only to companies receiving investment promotion and other qualifying companies. Government fees for a work permit are in the range of THB850 to THB6,100 (about US\$25 to US\$181) depending on the validity granted which could be up to two years.

While staying in Thailand, the foreign person must comply with the period of stay which is initially granted at 90 days on arrival (stamped in the passport). The foreign person must leave Thailand by the expiry date or apply for an extension of stay with the Thai Immigration Bureau. A permanent resident permit is not available until completion of a minimum stay of three consecutive years in the country, among other criteria.

## TAX

### 12. In relation to employees, what constitutes tax residency in your jurisdiction?

A person (Thai or foreign) who resides in Thailand for a total period of 180 days or more (not necessarily consecutively) in any tax (calendar) year is considered a resident of Thailand for tax purposes.

### 13. What income tax or social security contributions must the following pay:

- Tax resident employees?
- Non-tax resident employees?
- Employers, in relation to their employees?

#### Tax resident employees

Tax resident employees are subject to personal income tax at the progressive rate of 10% to 37%. The tax year is from 1 January to 31 December.

#### Non-tax resident employees

Non-tax resident employees are subject to income tax in the form of a withholding tax on the gross amount of their Thai source income at the flat rate of 15%. Tax payable is withheld at source at the time of the payment.

#### Employers

Employers must withhold income tax at the progressive rate or at the flat rate of 15%, as the case may be, and remit the tax to the Thai tax authority no later than the seventh day of the month following the month of payment.

#### Social Security Fund

Employers and employees must each contribute to the Social Security Fund an amount equal to 5% of the employee's gross wages up to a maximum of THB750 (about US\$22) per month.

According to the Ministerial Regulation dated 9 July 2009, the Social Security Contribution Rate will be reduced from 5% to 3% (maximum of THB450 (about US\$13)) effective from July to December 2009. From 1 January 2010 onwards, the rate will be 5%.

#### Workmen's Compensation Fund

Employers must contribute annually to the Workmen's Compensation Fund between 0.2% and 1% of an employee's annual earnings (up to a maximum of THB240,000 (about US\$7,138)), depending on the classification of the employer.

### 14. In relation to business vehicles, what constitutes tax residency in your jurisdiction?

Companies incorporated in Thailand are deemed to be tax residents of Thailand.

### 15. Please give details of the main taxes that potentially apply to a tax resident business vehicle (including rates).

Thai companies must pay the following taxes on their worldwide income.

#### Corporate income tax

This must be paid at the rate of 30% on the net profit earned during a tax year.

#### Value added tax (VAT)

VAT is payable at the rate of 7% (or 0% for export of goods and services) on the following categories of business transactions:

- Sale of goods.
- Provision of services.
- Export sales.
- Import of goods for any purpose.

Some business activities are exempt from VAT (such as sales of agricultural products).

#### Specific business tax (SBT)

Some business activities are subject to SBT instead of VAT, such as:

- Banking or similar activities.
- Credit foncier (that is, the business of lending money on the security of mortgage of immovable property in the ordinary course of business).
- Securities.
- Life insurance.
- Pawn shop services.
- Commercial sales of immovable property or sales of immovable property for profit.

The rate payable varies between 0.1% and 3% of gross monthly receipts.

#### Municipal tax

This applies to anyone subject to SBT and is charged at the rate of 10% of the SBT payable. Municipal tax is already included in the 7% of VAT paid.

## Stamp duty

There are 28 transaction documents subject to stamp duty (*Stamp Duty Schedule, Revenue Code*). The rate of stamp duty payable depends on the document executed.

### 16. How are the activities of non-tax resident business vehicles taxed?

Non-tax resident business entities (foreign companies) not carrying on business in Thailand must pay a withholding tax on the gross amount of their Thai source income (such as service fees, royalties, interest and rental income) at the flat rate of 15% (or 10% for dividends). Tax payable is withheld at source at the time of the payment.

### 17. Please explain how each of the following is taxed:

- Dividends paid to foreign corporate shareholders.
  - Dividends received from foreign companies.
  - Interest paid to foreign corporate shareholders.
  - Intellectual property (IP) royalties paid to foreign corporate shareholders.
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- **Dividends paid.** Dividends are subject to a withholding tax at 10%.
  - **Dividends received.** Dividends are taxed as ordinary income of the Thai company.
  - **Interest paid.** Interest is subject to a withholding tax at 15%.
  - **IP royalties paid.** Royalties paid to foreign corporate shareholders are subject to a withholding tax at 15%, which can be reduced to 5% or 10% under some tax treaties.

### 18. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)? If so, please give details.

Thailand does not have thin capitalisation rules.

### 19. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

There are no controlled foreign corporation rules in Thailand. A Thai parent company is only subject to tax on dividends paid to it by a foreign subsidiary.

### 20. Are there any transfer pricing rules? If so, please give details.

The Revenue Department can assess, without justification:

- Transfers of assets with or without below-market-value compensation.
- The provision of services with or without below-market-value service charges.
- Monetary loans with or without below-market-value interest.

Market value is defined as the remuneration that an independent party would fairly set in business practice.

### 21. How are imports and exports taxed?

Customs duty is imposed mainly on imported and selected exported goods. Customs duty is levied in accordance with the Harmonised Commodity Description and Coding System.

As a signatory to the General Agreement on Tariffs and Trade and a member of the World Trade Organisation, Thailand complies with all relevant standards and codes when determining customs duty.

Imports and exports are also subject to VAT (*see Question 15*).

### 22. Is there a wide network of double tax treaties? If so, please give details.

Thailand has signed 53 double tax treaties including with the United States and European and Asian countries.

## COMPETITION

### 23. Are restrictive agreements and practices regulated by competition law in your jurisdiction? If so, please give brief details.

The Trade Competition Act 1999 regulates agreements and practices which may create unfair competition. The Act established the Trade Competition Commission to oversee and ensure compliance with its provisions.

## INTELLECTUAL PROPERTY

### 24. Please outline the main intellectual property rights that are capable of protection in your jurisdiction. In each case, please state:

- **Nature of right.**
- **How protected.**
- **How enforced.**
- **Length of protection.**

#### Patents

- **Nature of right.** To qualify for an invention patent, an invention must:
  - be new;
  - involve an inventive step; and
  - have an industrial application.

An invention that lacks an inventive step (a utility model) can be protected by a petty patent. A patent owner enjoys exclusive rights to produce, import, use or sell the protected product or process.

- **How protected.** To obtain protection, an application for a patent must be submitted to the Department of Intellectual Property.
- **How enforced.** A patent owner can bring:
  - a criminal action to prevent infringement which includes fines from THB20,000 (about US\$594) to THB400,000 (about US\$11,897) and/or imprisonment of six months to two years;
  - a tort action under the Civil and Commercial Code.
- **Length of protection.** An invention patent is protected for a non-renewable period of 20 years. A petty patent is protected for six years, which is renewable for a further two years on two occasions (up to a maximum of ten years).

#### Trade marks

- **Nature of right.** The Trademark Act 1991 (as amended) provides a framework for the registration and protection of trade marks, service marks, certification marks and collective marks. To be capable of registration, a mark must:
  - be distinctive;
  - not be excluded by the Trademark Act; and

- not be identical or similar to trade marks already registered.

- **How protected.** Registered trade mark owners have the exclusive right to use the mark on any goods for which registration has been obtained. Applications for trade mark registration must be submitted to the Department of Intellectual Property.

There is no specific legislation relating to unregistered trade marks in Thailand. The owner of an unregistered trade mark can obtain indirect protection under the Civil and Commercial Code if identifiable ownership rights to the unregistered mark (such as established reputation and goodwill) can be established.

- **How enforced.** A trademark owner can bring:
  - a criminal action in case a third party forges or imitates a mark without authorisation or imports, sells or offers for sale products bearing forged or imitative marks. The penalties include fines from THB200,000 (about US\$5,948) to THB400,000 (about US\$11,897) and/or imprisonment of two to four years;
  - a tort action under the Civil and Commercial Code.

For unregistered marks, enforcement can be through an action for passing off under the Civil and Commercial Code and/or the Penal Code.

- **Length of protection.** Protection lasts for ten years from the date of filing an application for registration, renewable indefinitely for ten-year periods. There is no defined term of protection for unregistered marks.

#### Registered designs

- **Nature of right.** Registered designs are protected by the Thai Patent Act 1979, as amended. To qualify, a product design must be:
  - composed of lines or colours which give a special appearance to a product;
  - new; and
  - for industrial use.
- **How protected.** Applications for a design patent must be submitted to the Department of Intellectual Property.
- **How enforced.** The enforcement procedure is the same as for patents (*see above, Patents*).
- **Length of protection.** Protection is for a non-renewable ten-year period.

### Unregistered designs

- **Nature of right.** There is no specific protection for unregistered designs. However, a design may be protected under section 4(7) of the Copyright Act 1994, as a work of applied art.
- **How protected.** A work of applied art is a protected work that is used for a practical purpose rather than just for artistic appreciation. Copyright protection arises automatically on creation or publication of the work.
- **How enforced.** The enforcement options are the same as for patents. The penalties for a criminal action include fines from THB20,000 (about US\$620) to THB800,000 (about US\$24,845) and/or imprisonment of six months to four years. Repeat offenders (within five years) can be liable to double punishment.
- **Length of protection.** A work of applied art is protected for 25 years from the date the work was created or, if published, 25 years from its publication.

### Copyright

- **Nature of right.** Copyright can subsist in the following original works (Copyright Act 1994):
  - literary (including computer programs);
  - artistic;
  - dramatic;
  - musical;
  - audio-visual;
  - cinematographic;
  - sound and video broadcasting;
  - compilations;
  - any other original works of a literary, scientific or artistic nature.

A copyright owner has the exclusive right to:

- reproduce or adapt the work;
- disseminate the work to the public;
- rent out the work;
- grant licences for the work; and
- sell the copyright.
- **How protected.** Copyright protection arises automatically on creation or publication of the work. The copyright owner can record his ownership with the Department of Intellectual Property.
- **How enforced.** This is the same as for unregistered designs (see above, *Unregistered designs*).

- **Length of protection.** Protection for most works lasts for the lifetime of the creator plus 50 years, except works of applied art (see above, *Unregistered designs*).

### Confidential information (trade secret)

- **Nature of right.** To qualify as a trade secret under the Trade Secrets Act 2002, information must:
  - not be known to the public;
  - not yet be known to those who would usually deal with it;
  - have commercial value as a result of its secrecy; and
  - be controlled using reasonable measures to ensure it remains secret.

The owner of a trade secret has the right to disclose it, use it, and permit others to use it.

- **How protected.** Trade secrets are automatically protected (no application procedure is necessary). The rights often arise from contractual relationships, although this is not always necessary. Trade secret rights can be infringed by:
  - disclosing the trade secret;
  - preventing the owner from using the trade secret; or
  - using the information without the consent of the owner and in a manner contrary to honest trade practices (such as breach of contract and bribery).
- **How enforced.** The enforcement options are the same as for patents. Criminal remedies include fines of THB200,000 (about US\$5,948) to THB2 million (about US\$59,484) and/or terms of imprisonment of one to ten years.
- **Length of protection.** Trade secrets are protected for as long as they remain secret.

## MARKETING AGREEMENTS

**25. Are marketing agreements regulated in your jurisdiction? If so, please give brief details in respect of the following arrangements:**

- **Agency.**
- **Distribution.**
- **Franchising.**

- **Agency.** Agency agreements are regulated by general contract and agency principles under the Civil and

Commercial Code and must be construed in accordance, and comply, with their express terms.

- **Distribution.** There are no specific laws relating to distribution agreements.
- **Franchising.** There are no specific laws relating to franchise agreements.

The principle of freedom of contract applies to all marketing agreements, provided the terms and provisions agreed by the contracting parties are not contrary to public order or good morals.

## E-COMMERCE

### 26. Are there any laws regulating e-commerce (such as electronic signatures and distance selling)? If so, please give brief details.

The Electronic Transactions Act 2001 regulates electronic civil and commercial transactions and signatures. The Act on Computer-Related Offences 2007 sets out various types of virtual criminal offences. Penalties of both imprisonment and fines may be imposed not only on violators but also on service providers. The draft Data Protection Bill remains on the agenda and is being reviewed by the Council of State.

## DATA PROTECTION

### 27. Are there any data protection laws? If so, please give brief details.

The Act on Computer-Related Offences covers data security and provides penalties for unauthorised access or changing of data. No specific data protection legislation presently exists. However, a draft law based on the European model is under consideration (see *Question 26*).

## PRODUCT LIABILITY

### 28. Are there any laws regulating product liability and product safety? If so, please give brief details.

Two new laws were recently adopted to address product liability and product safety issues. The first one, a substantive law, is the Unsafe Goods Liability Act 2008 (also known as the Product Liability Act). The Act came into force in February 2009. Thailand also adopted the Consumer Case Procedure Act 2008, a procedural law to regulate court proceedings in relation to disputes between consumers and business operators. This took effect in August 2008.

### Unsafe Goods Liability Act

The Unsafe Goods Liability Act 2008 is designed to protect consumers who incur damage from defective or dangerous products by imposing strict liability on business operators involved in the manufacture and/or sale of the product. The operator is liable regardless of whether it was negligent in making or selling the product. The Act addresses three specific types of product defects:

- Manufacturing defects.
- Design defects.
- Insufficient warnings (or failure to warn).

Under the Act, product liability cannot be waived or limited by way of contract or by any waiver or limitation of liability statement given by an operator.

### Consumer Case Procedure Act

The Consumer Case Procedure Act 2008 is intended to make it easier for consumers to pursue product liability claims against business operators. The Act simplifies and expedites the legal process for an injured party to seek redress in many ways. For example, consumers can file complaints orally, and court fees are waived for consumers who wish to file an action. In addition, the court is given considerable discretion under the Act to conduct the proceedings and to ensure that consumers receive fair treatment.

#### CONTRIBUTOR DETAILS

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